

No. 12884.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Appellants' Reply to Brief of Appellee John C. Kazan-
jian, Doing Business as Red Lion Packing Com-
pany.

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I.

Appellants Have Not Misconstrued Section 499g(c)
of the Perishable Agricultural Commodities Act.

Accusing appellants of overlooking elementary principles of law (Kazanjan Br. p. 3), Kazanjan apparently contends that the *prima facie* effect of the findings of the Secretary of Agriculture need not be *overcome* by contradictory evidence. Kazanjan nevertheless cites the very cases which hold that the *prima facie* evidence stands *until overcome* by other evidence.

The second elementary principle of law which Kazanjan claims we have overlooked is the rule that findings of a

trial court, supported by competent evidence, will not be set aside unless such findings are clearly erroneous. Not only have we not overlooked such well established rule of law, but we gave affirmative expression to it in our opening brief. (Our Op. Br. pp. 34-35.)

Kazanjian's brief is replete with assertions that the findings and conclusions of the District Court are "amply supported" by the evidence. Kazanjian then leaves to the imagination where such support may be found in the record. Kazanjian charges appellants with overlooking record evidence adverse to appellants. In our opening brief we were painstaking in supporting every assertion made with transcript references. We attempted to be as objective as possible, and we referred to the evidence whether deemed adverse to our position or not. Similar candor and objectiveness is not to be found in Kazanjian's brief.

II.

Crane Acted for Both Kazanjian as Seller and Appellants as Buyers.

Kazanjian argues that Crane was solely and exclusively the agent of the appellants. Since Kazanjian's argument offers nothing new or additional to the argument upon this point made in the brief of appellee Crane, we adopt by reference our reply to Crane's brief upon this subject matter.

In the case of *Prentice Packing and Cold Storage Co. v. Springer Produce House*, P. A. C. A., Docket No. 93, S. 129, the Secretary of Agriculture declared:

"It is the usual custom throughout the produce trade for the broker to act for both seller and buyer in negotiating sales of this nature * * *."

It will be apparent that Crane acted as a broker who served to bring two parties together in a contract of sale. Appellees ignore the distinction between a broker and a mere agent. They fail to comment upon the cases which hold that in so far as a broker transmits offers and counter-offers between parties, he becomes the agent of each. Appellees are eloquently silent as to the testimony of Kazanjian that Crane acted as his agent in tendering grapes to appellants at \$3.25 per lug. [Tr. pp. 289, 481.] Appellees ignore the evidence that Crane notified Kazanjian that he had sold for Kazanjian's account, both in a telephone conversation and in writing. [Tr. pp. 453, 308, 309.]

As heretofore pointed out, Kazanjian is liable for his breach of contract whether Crane was his agent or not. In view of the evidence, however, that Kazanjian, on October 4th, by telegram, ratified the sale made by Crane as Kazanjian's agent, we insist that a finding that Crane did not act as agent for Kazanjian is clearly erroneous. Kazanjian denies that his October 4th telegram was a ratification, and asserts that it constituted a rejection of Crane's sale and a counter-offer. We shall discuss this argument in our next point.

III.

Kazanjian Fails to Establish That a Binding Contract Had Not Been Entered Into Between Him and Appellants.

In Kazanjian's brief no contention is made that any of the written documents in this case are ambiguous. Kazanjian also fails to challenge the rule that in the absense of ambiguity, mistake, or fraud, the intention of the parties must be determined from the writings themselves, without resort to extraneous evidence.

Kazanjian insists that his telegram of October 4th did not constitute an acceptance or ratification of Crane's telegram to Kazanjian of October 3rd. Kazanjian states that there are material differences in the terms set forth in each of such documents. The District Court made no finding which specified such differences.

It is unbelievable that any person engaged in the produce industry could read Kazanjian's October 4th telegram as a rejection of the transaction. Crane, in his testimony, admitted that there was no material difference in the terms mentioned by Kazanjian in his October 4th telegram from the terms stated by Crane in his October 3rd telegram. [Tr. p. 310.]

This Court may judicially note that the Secretary of Agriculture is called upon to decide thousands of cases of this type, and consequently, is much better qualified than the District Court to construe such a contract. The Department of Agriculture here is in somewhat an analogous position to the Tax Court, which is recognized to have particular competence in tax matters. (*Dobson v. Commissioner of Internal Revenue*, 64 S. Ct. 239, 320 U. S. 489, 88 L. Ed. 248.)

The Department of Agriculture found that on October 3rd, Crane notified Red Lion by telegram that the sales of the ten carloads of grapes here involved "had been completed," and that "the following day Red Lion (Kazanjian) replied by telegram that this was satisfactory." [Tr. p. 50.] Referring to the October 4th telegram from Kazanjian to Crane, the Department of Agriculture concluded:

"this exchange of telegrams constituted a ratification by Red Lion (Kazanjian) of the sale of the ten carloads of grapes to complainants." [Tr. p. 57.]

The first of the differences which Kazanjian claims to exist, refers to the element of *time* when the deposit of \$1,000.00 per car for the ten cars was to be made. Crane's telegram provided that the deposit be paid "upon receipt U. S. ONE Government inspection." Kazanjian's telegram stated "deposit to be made immediately on inspection at shipping point." Kazanjian argues that his language was a rejection of Crane's language. Crane was referring to the "time" of payment, and Kazanjian was referring to the "time and place" of payment. The place of payment was Exeter, for it was there that the seller was located. Neither Crane nor appellants ever suggested that payment be made at any other place. Crane instructed Margules to collect the deposits and to forward them to Crane as soon as Government inspection was wired on each car. [Tr. p. 25.] Thus, Crane was to be in a position to deliver the funds to Kazanjian at Exeter as soon as there was telegraphic notification that the grapes had passed the government inspection. No one ever suggested, as Kazanjian infers, that appellants were to pay Kazanjian in Texas.

The most reliable test as to whether the October 4th telegram differed from the October 3rd telegram is found in Crane's testimony, as follows:

"Q. Was there anything in the telegram that indicated to you that Mr. Kazanjian was quoting terms different from, or other than those terms which he had authorized you to confirm to the Southwest brokerage firm? A. They are the same terms that we offered to the Southwest Brokerage Co.." [Tr. p. 310.]

The next alleged "point of difference" urged by Kazanjian is Crane's language:

"Depending you handle through us balance of cars you mentioned for fresh shipment—advise when expect ship these."

The foregoing language is significant also on the matter of the agency between Crane and Kazanjian, for we find Crane, after the completed sale, asking that the balance of the crop be handled by Kazanjian *through Crane*.

Kazanjian argues that this was a condition to Crane's offer, and that it was rejected by Kazanjian stating:

"balance of pack intended to load after October Twentieth. Will be glad to make deal on same about October Fifteenth."

It is ridiculous to construe Crane's request that he be permitted to handle the balance of the grape crop as a condition to the transaction. Crane was referring to a completed sale. In the same message he was soliciting further business from Kazanjian.

It is equally ridiculous to construe Kazanjian's reply as a rejection of Crane's request. In his telegram to Kazanjian, Crane says that with respect to the "balance" of the cars "advise when expect ship these—believe we could place them now * * * suggest give us proximate shipping dates."

Instead of rejecting this invitation to handle the additional cars as Kazanjian's agent, Kazanjian appeared very amenable and replied:

"balance of pack intended to load after October 20th—*will be glad to make deal on same about October 15th.*"

It is true that Kazanjian testified that his telegram was intended by him as a rejection of Crane's proposal of new terms. This self-serving testimony is rebutted by the very language he authored, and by Crane's testimony aforementioned. It is refuted by the construction of the Secretary of Agriculture. For the District Court to have based its finding upon such self-serving testimony and in disregard of the expressed written documents constitutes a clear case of error.

Kazanjian's argument can be compared to that of the appellees in the recent case of *Propstra v. Dyer Sugar Trading Corp.*, 189 F. 2d 810, in which case the Court of Appeals for the Second Circuit reversed the trial court and said:

"We are satisfied that a contract between Propstra and Dyer was made on September 11. Dyer's claim that its telegram and letter of that date were a rejection of plaintiff's proposal of September 10 and constituted a counter-offer because 'October sellers option' stated a different shipping period from that described by the words 'as soon as possible or latter part of September or early October' in the plaintiff's telegram is highly artificial . . ."

A still further argument is made by Kazanjian, this one for the first time on appeal. On page 16 of his brief, Kazanjian says:

"Appellants, by their pleadings and testimony, claim to have purchased ten cars, yet the two telegrams refer to fifteen cars."

Does Kazanjian now contend that the fifteen cars mentioned in these telegrams did not include the ten cars purchased by and sold to appellants?

It so happens that Kazanjian's breach of contract as to three of the remaining five cars reached this court on appeal of *Joseph Denunzio Fruit Co. v. Crane*, Docket No. 12884, 188 F. 2d 569.

The pointlessness of this new contention is characteristic of the extent to which Kazanjian will go to escape liability in this case.

Kazanjian's showing of differences between the October 3rd and October 4th telegrams culminates with what he calls a "contingent term," to wit: that Crane, in his wire, told Kazanjian that he would forward confirmations for Kazanjian's signature as soon as he received them via airmail from the buyers. (Kazanjian's Br. p. 17.) We do not know what Kazanjian means by a "contingent term." Perhaps he means that such specification was a "condition precedent" to the contract. However, Crane's telegram to Kazanjian of October 3rd was not an offering of terms. It was a written confirmation of the fact that Crane had already sold for Kazanjian's account upon authority previously received in a telephone conversation. Crane testified to this telephone conversation, and testified that Kazanjian had told him to go ahead and confirm the transaction. [Tr. pp. 308-309.]

Crane's promise to send confirmations to Kazanjian for his signature was not a condition to the contract, the contract having already been consummated. Kazanjian immediately ratified the sale without waiting for any signed confirmations. Crane did not request such written confirmation from appellants. Reference to the record of the *Denunzio* case will reveal that Crane had informed the broker for Denunzio, one A. B. Rains, that Crane would forward confirmations to Rains to be signed by Denunzio, and then returned to Kazanjian for the signature of

Kazanjan. Apparently, he was referring to these confirmation forms. It will be also noted in the Denunzio record that Crane never sent such confirmations to Rains, but accepted Rains' Standard Memorandum of Sale.

Kazanjan does not comment upon the authorities cited in our opening brief holding that the failure to reduce a contract of sale to a precise form intended by the parties does not prevent the agreement from being effective. (Our Op. Br. pp. 32-33.)

IV.

Kazanjan Fails in His Attempt to Support the District Court Finding That Crane Intended to Designate a Standard Confirmation.

This point was argued extensively in our reply to the brief of appellee Crane. We shall avoid repetition and hereby adopt by reference the arguments propounded by us in our reply to the Crane brief.

We wish merely to reassert once again that the words "subject to confirmation" clearly refer to confirmation by the seller, and need not be in writing. The phrase is not ambiguous, and its meaning is particularly evident when construed within the definitions promulgated by the Department of Agriculture.

In the case of *Milliken-Tomlinson Co. v. American Sugar Refining Co.*, 9 F. 2d 809, at page 813, the Court of Appeals for the First Circuit said:

"As to the first contention, the orders expressly provided that they were 'subject to acceptance' by plaintiff. These terms are not ambiguous. They did not require a signed acceptance. A written offer does not require a written acceptance in order to create a valid and binding contract." (Citing cases and Williston on Contracts (1920) 586.)

V.

Kazanjan Has Failed to Show the Existence of Any Evidence Supporting the Trial Court's Conclusion That Kazanjan Had Never Accepted the Terms Proposed by Margules.

In a short paragraph on page 20 of his brief, Kazanjan seeks to defend conclusion number two of the District Court. [Tr. p. 82.] He asserts that appellants have not sustained their burden to establish a lack of evidentiary support. Although we devoted less than a page to this argument, we directed attention to *all of the communications from Margules to Crane*, consisting of items 2, 5, 7 and 10 of the appendix to appellants' opening brief. (Our Op Br. p. 41.) We stated that these documents do not reveal the proposal of any terms by Margules. We can refer to the transcript, pages 1 to 486, inclusive, in no portion of which will be found evidence oral or documentary that Margules proposed any terms to Crane.

Kazanjan states that the record shows that the only act of Kazanjan, whether it be acceptance, rejection, or a counter-proposal, was contained in his telegram of October 4, 1944. (Kazanjan's Br. p. 20.) Attention is directed to the testimony of Crane, that Kazanjan had orally authorized Crane to confirm the sale. Crane testified that prior to the telegram of September 26, 1944, he had discussed the terms of the sale with Kazanjan, and Kazanjan had stated that if Crane had any business at that price he would think about confirming it. [Tr. pp. 212-213.] Crane testified that Kazanjan confirmed

the change of price from \$2.53 per lug, originally quoted, to \$2.50 per lug. [Tr. p. 213.] Crane testified that he had a telephone conversation with Kazanjian on October 2, 1944, in which Kazanjian told him to confirm the sale. [Tr. pp. 308-309.]

VI.

Kazanjian Has Failed to Show Support of the District Court's Conclusions That the Terms Contained in Kazanjian's Telegram of October 4th Were Never Accepted by Appellants.

The error in the District Court's conclusion number two which we have charged is not that there was an acceptance of terms proposed by Kazanjian in his telegram of October 4, 1944, but that the District Court erred in finding that any terms were proposed by Kazanjian on October 4th.

It is only necessary to read the text of such telegram to show the futility of Kazanjian's effort to make a proposal out of a ratification. Point III of this brief covers this subject matter.

VII.

Kazanjian Now Admits That the Statute of Frauds Is Not a Defense to This Action.

At one time, the only substantial issue in this case was the California Statute of Frauds. Thus, the Secretary of Agriculture said:

"The most important and perhaps the only real issue here is whether a contract was made which is enforceable under the California Statute of Frauds."
[Tr. p. 54.]

This defense was extensively argued before the District Court, and found its way into the Findings of Fact and Conclusions of Law of the District Court. [Tr. pp. 79, 80, 82.] Since the trial of this case, the Court of Appeals for the Third Circuit has convincingly established that the Statute of Frauds does not apply to this type of proceeding. (*Rothenberg v. H. Rothstein & Co.*, 183 F. 2d 524.)

In the District Court, Kazanjian and Crane both insisted, and induced the District Court to conclude, that the statute of frauds operates as to all parties of the proceeding, and that the contract failed because appellants (not the parties to be charged) had not signed a written memorandum of the transaction other than through Margules, as their broker and agent.

Crane, in his brief, avoided the issue entirely, adopting whatever argument that Kazanjian would make. Kazanjian now argues that the whole issue is immaterial, because, he says:

“It is established by the amply supported findings of the Court that Kazanjian was not a party to a contract, and had not authorized Crane to act for him.”

It is safe to assume, therefore, that the defense of the Statute of Frauds has been abandoned and Kazanjian now relies entirely upon the finding that Kazanjian was not a party to a contract, and that Crane had no authority from him to act in this transaction. These questions have already been dealt with in this brief.

VIII.

Kazanjan, in Effect, Admits That the Contract Was Not Void for Violation of the Emergency Price Control Act.

This was one of the defenses born after the trial before the Secretary of Agriculture and prior to the trial in the District Court. In view of the decision of this Court in *Joseph Denunzio etc. v. Crane*, 188 F. 2d 569, Kazanjan now informs us that the point is entirely immaterial in the present case, and relies solely upon the alleged absence of a contract between the parties. The alacrity with which appellees have abandoned the defenses of the Statute of Frauds and illegality of contract is illustrative of the lack of integrity that surrounds each and all of the defenses urged by appellees.

IX.

In the Absence of Acquiescence, the Date of Delivery Under the Contract Is the Date to Be Used for Measuring Damages.

Oddly enough, Kazanjan and appellants both rely upon the same case, to wit: *Compania Engraw v. Schenley Distillers Corp.*, 181 F. 2d 876, decided by this Court. The point of difference rests with a determination of whether, by purchasing replacement grapes on October 24, 1944, appellants had *acquiesced* in the repudiation of the contract. Kazanjan's brief merely assumes such acquiescence.

To the extent that appellants purchased replacement grapes prior to December 10, 1944, their claim for damages has only been for the difference between the contract price and the cost of the replacement grapes. Appellants had the right to replace part of the grapes, and wait until after the delivery date as to the balance of the grapes sold under the contract. As determined by the District Court in *Joseph Denunzio et al. v. Crane*, 79 Fed. Supp. 117, 130:

“Under the law, Joseph Denunzio, in the purchase of these three cars of grapes to compensate for the three cars which Raymond M. Crane and/or J. C. Kazanjian refused to ship under the breached contract, was not obliged to anticipate at his peril, that the cost of grapes would be less prior to December 10, 1944, than afterward; in other words, he could wait until delivery time and then purchase at the best price obtainable, and recoup his cost by way of damages.”

Had the price been lower on December 10th than it was in October of 1944, then assuredly, appellees would have contended that appellants should have waited until after December 10th before making replacement purchases. Kazanjian blows hot and cold, depending upon the temperature most suitable to his ends. We believe that the Secretary of Agriculture was correct in his finding that complainants made diligent effort to secure replacement of grapes after being informed of the breach [Tr. p. 51], and that he was correct in his conclusion that the measure of damages is the loss directly and

entirely resulting from the seller's breach of contract, to wit: the difference between the price agreed to be paid and the market value when the goods ought to have been delivered. [Tr. p. 59.]

To have been consistent with its finding that no contract existed between the parties, it was injudicious for the District Court to make findings with respect to the measure of damages. The expressed purpose of the District Court was to discourage an appeal, and the District Court thereupon adopted the least possible measure of damages. [Tr. pp. 258-259.]

X.

Conclusion.

Kazanjian relies entirely upon a tenuous and completely unreasonable interpretation of his October 4th ratification telegram as a rejection and counter-offer. This case is simplified by the Kazanjian brief because it narrows the issues on appeal to an interpretation of the October 3rd and October 4th telegrams. The Court of Appeals for the First Circuit in the case of *Milliken-Tomlinson Co. v. American Sugar Refining Co.*, 9 F. 2d 809, at pages 813 and 814, referred to similar contentions as being "insubstantial" and "mere quibble." That Court recognized that such discrepancies are frequently unduly exaggerated by the exigencies of the case, and quotes *Mr. Justice Van Devanter* in the case of *A. B. Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 45 Sup. Ct. 295, 69 L. Ed. 589, as follows:

"In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments."

It was not until October 10, 1944, when the ceiling price on grapes was vacated, that anyone urged that a contract had not been fully and completely consummated between Kazanjian and appellants.

We respectfully urge reversal of the District Court decision, reinstatement of the judgment against Kazanjian, attorneys' fees as provided by the Perishable Agricultural Commodities Act, and costs herein.

Respectfully submitted,

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